

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDY W. JONES and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Omaha, Neb.

*Docket No. 96-1878; Submitted on the Record;
Issued June 2, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$892.87; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

The Board has duly reviewed the case record and concludes that the Office properly determined that an overpayment existed in the amount of \$892.87 and that appellant was at fault in the creation of the overpayment.

In the present case, the Office accepted that appellant sustained thoracic and lumbar strains in the performance of his federal employment on July 13, 1995. By letter dated October 19, 1995, the Office advised appellant that his claim had been accepted and that he would receive payments every four weeks in the amount of \$1,171.48. Appellant was advised in this letter that to avoid an overpayment of compensation, he was to notify the office immediately when he returned to work and that he was to return to the Office any compensation check(s) received after he returned to work. Appellant returned to full-duty work on November 13, 1995. A memorandum of record indicates that the employing establishment informed the Office that appellant was telephoned on November 29, 1995 and was told that he was not to cash any compensation check received for any period after November 13, 1995. By letter dated December 11, 1995, the Office advised appellant that it had been unable to stop issuance of the check for the period November 13 to December 9, 1995, although appellant had returned to work on November 13, 1995. Appellant was again advised that he should return any compensation check received after he returned to work.

On March 31, 1996 the Office issued a preliminary determination that an overpayment of compensation occurred in appellant's case in the amount of \$1,129.64 because appellant returned to work on November 13, 1995 and was paid compensation for the period November 13, 1995 through December 9, 1995. Appellant was further advised that a preliminary finding had been

made that he was at fault in this matter because he was aware or should have been aware that this compensation was not due after his return to work. A memorandum of record dated April 29, 1996 notes that after the overpayment of \$1,129.64 had been calculated, information was received from the employing establishment indicating appellant's entitlement to compensation at a higher pay rate. At the higher pay rate, appellant's actual entitlement for the period September 6 through December 9, 1995 would have been \$3,110.61, while appellant had actually received \$3,983.54, therefore resulting in an overpayment of \$872.93.

On April 22, 1996 appellant advised the Office that he was not at fault in the creation of the overpayment because he "was told" that he had not received "total payment from workmen's comp[ensation]." Appellant stated that he held the check in question for two months, but was not notified by the Office verbally or in correspondence what he should do with the check. Appellant stated that he was out of work in December 1995 and did not receive any other money during that time period. Appellant requested a prerecoupment hearing. A telephone conference hearing was held on May 2, 1996. During this telephone conference appellant again stated that he had not received any letters from the Office advising him that he was to receive compensation checks received after a return to work. On May 1, 1996 the Office issued a final decision that an overpayment occurred in the amount of \$872.93 because appellant received compensation during his employment from November 13 to December 9, 1995. Appellant was also found to be at fault in the matter because he had been notified by letters dated October 19 and December 11, 1995 and the employment establishment's telephone call of the need to return any check received after a return to work.

Section 8129(a) of the Act¹ provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

An individual is with fault in the creation of an overpayment who:

"(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

"(2) Failed to furnish information which the individual knew or should have known to be material; or

"(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."'²

¹ 5 U.S.C. § 8129(a).

² 20 C.F.R. § 10.320.

Appellant is not disputing that he received an overpayment in the amount of \$892.87 during the period November 13 to December 9, 1995 when he worked full duty and received disability wage-loss compensation. Appellant is alleging, however, that he is not at fault in the creation of the overpayment. Appellant has alleged that when he received the compensation check in question, he did not know if he was to cash the check and therefore he kept the check for a period of two months. Appellant stated that he believed he might be entitled to some additional compensation benefits. The evidence of record establishes that less than two months prior to his return to work, in a letter dated October 19, 1995, the Office advised appellant that his claim had been accepted and that he would receive wage-loss benefits every four weeks. Appellant was also plainly informed that if he returned to work, he was to return to the Office any compensation checks received after he returned to work to avoid an overpayment of compensation. Appellant was also telephoned by the employing establishment on November 29, 1995 and was told to return any compensation check he received after his November 13, 1995 return to work. Furthermore, appellant was advised by an Office letter dated December 11, 1995 that the Office had been unable to stop issuance of a check for the period November 13 to December 9, 1995 and that appellant was to return this check to the Office. While appellant has stated that he believed he was entitled to some additional compensation, the record establishes that appellant should have known he was not entitled to receipt of the entire check for the period through December 9, 1995 as he was sufficiently informed that he was to return any check he received after a return to work to avoid an overpayment of compensation. The Office therefore properly determined that appellant accepted a payment which he knew or should have known was incorrect.

Appellant has alleged that he did not receive the letters sent by the Office advising him that he was to return the check in question, or the telephone call from the employing establishment. The Board has affirmed the use of the mailbox rule to establish receipt of correspondence prepared and mailed in the ordinary course of business. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.³ In the present case, the record establishes that the Office's letters dated October 19 and December 11, 1995 were properly addressed and duly mailed. It is therefore presumed that appellant received such notices. The record also properly documents the telephone communication from the employing establishment to appellant on November 29, 1995. As appellant was with fault under the third standard set forth above, recovery of the overpayment of compensation in the amount of \$892.87 may not be waived.

With respect to the recovery of the overpayment, the Board notes that its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. The record indicates that appellant was no longer receiving wage-loss compensation benefits at the time the Office issued its final decision regarding

³ *Newton D. Lashmett*, 45 ECAB 181 (1993).

recovery of the overpayment, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.⁴

The decision of the Office of Workers' Compensation Programs dated May 1, 1996 is hereby affirmed.

Dated, Washington, D.C.
June 2, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member

⁴ *Gregory A. Compton*, 45 ECAB 154 (1993).